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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

WASHINGTON, D. C.

DANIEL L. WILLIAMS,
Petitioner
vs
DR. JAMES A. RICKETTS, Warden
Respondent

77-5996 Term 1977

MISC. CASE NO. _____

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF GEORGIA

NOW COMES DANIEL L. WILLIAMS, Petitioner, by and through his counsel, FRANK B. HESTER, and respectfully moves the Court for a Writ of Certiorari to review the judgment of The Supreme Court of Georgia, Case No. 32563, Ricketts, Warden vs. Williams, decided November 8, 1977 and concurred in specially November 10, 1977.

OPINION AND JUDGMENT

The Petitioner, DANIEL L. WILLIAMS, was charged with rape, tried by a jury, found guilty and sentenced to twenty (20) years in prison. Petitioner was granted a new trial after this jury verdict on the basis of the finding by the trial judge that "the verdict is decidedly and strongly against the weight of the evidence." Ga. Code Ann. §70-206. Petitioner entered a plea of guilty to this charge of rape after the granting of the new trial, the State conceding that there was no new evidence, and Petitioner was sentenced to five (5) years imprisonment. Petition for Writ of Habeas Corpus resulted in his order for release, the Habeas Corpus Court ruling that the new trial order was "a finding that the evidence did not authorize the verdict" and that a retrial was barred under Ga. Code Ann. §26-507(d)(2). The State of Georgia appealed contending that double jeopardy bar did not apply in this case. The Supreme Court of Georgia held . . ."We hold however that a grant of a new trial by the trial judge under Code Ann. § 70-202 ("contrary to the evidence and the principles of justice

and equity") or Code Ann. § 70-206 ("decidedly and strongly against the weight of the evidence") does not result in a statutory double jeopardy bar under Code Ann. § 26-507(d)(2)" . . . A copy of the opinion and judgment of the Supreme Court of Georgia is attached hereto marked Exhibit "A" and is by reference made a part of this Petition.

JURISDICTION

The Petitoner in his Petition for Writ of Habeas Corpus filed pro se March 23, 1977 in Butts Superior Court, the Habeas Corpus Court, challenged the constitutionality of his conviction and sentence in Fulton Superior Court wherein he was charged with rape, tried by a jury, found guilty and sentenced to twenty (20) years in prison, was granted a new trial after this jury verdict on the basis of the finding by the trial judge that " the verdict is decidedly and strongly against the weight of the evidence;" and then after the State conceded that there was no new evidence he entered a plea of guilty and was sentenced to five (5) years imprisonment, this constitutional challenge going to the statutes and procedures involved. The Habeas Corpus Court ordered release from incarceration, however, the State of Georgia appealed, contending as follows: the court below (Habeas Corpus Court) erred in its finding that the granting of the new trial by the trial court was a legal bar to further prosecution of Petitioner-Appellee on the charge of rape and thereby setting aside his conviction on the rape pursuant to a guilty plea, the Supreme Court of Georgia in its decision agreeing with that contention. The Supreme Court of the United States has granted certiorari on a similar point in Greene v. Massey, Supreme Court No. 76-6617; argued November 28, 1977 and Burks v. U.S., Supreme Court No. 76-6528, argued November 28, 1977.

QUESTION PRESENTED

The question presented is whether the granting of a new trial after a jury verdict on the basis of the finding by the trial judge that "the verdict is decidedly and strongly against the weight of the evidence" in conformance with Ga. Code Ann. § 70-206 or "contrary to the evidence and principles of justice and equity" in conformance with Ga. Code Ann. § 70-202

results in statutory double jeopardy bar under Ga. Code Ann. § 26-507(d)(2) as well as violation of constitutional rights as provided in Article I, Section I, Paragraph VIII (double jeopardy, Ga. Code Ann. §2-108), Article I, Section I, Paragraph III (due process of law, Ga. Code Ann. § 2-103), Fifth Amendment to the Constitution of the United States (double jeopardy, Ga. Code Ann. §1-805) made mandatory on the states by the Fourteenth Amendment to the Constitution of the United States (due process of law, Ga. Code Ann. § 1-815).

STATUTES INVOLVED

1. Fifth Amendment to the Constitution of the United States of America.

2. Fourteenth Amendment to the Constitution of the United States of America.

3. Article, I, Section I, Paragraph VIII of the Constitution of the State of Georgia (double jeopardy, Ga. Code Ann. § 2-108).

4. Article I, Section I, Paragraph III of the Constitution of the State of Georgia (due process of law, Ga. Code Ann. § 2-103).

5. Ga. Code Ann. § 70-202 (6082; 1084 P. C.) Verdict contrary to evidence and principles of justice and equity. In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial before another jury. (Act 1799, Cobb, 503).

6. Ga. Code Ann. § 70-206 (6087; 1085 P. C.) Verdict against weight of evidence. The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding. (Acts 1853-4, p. 47).

7. Ga. Code Ann. § 26-507 Effect of former prosecution.

(a) A prosecution is barred if the accused was formerly prosecuted for the same crime, based upon the same amterial facts, if such former prosecution

(1) resulted in either a conviction or an acquittal; or

(2) was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury after the first witness

was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

(b) A prosecution is barred if the accused was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution

(1) resulted in either a conviction or an acquittal, and the subsequent prosecution is for a crime of which the accused could have been convicted on the former prosecution; or was for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge); or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the crime was not consummated when the former trial began; or

(2) was terminated improperly, and the subsequent proseuction is for a crime of which the accused could have been convicted if the former prosecution had not been terminated improperly.

(c) A prosecution is barred if the accused was formerly prosecuted in a District Court of the United States for a crime which is within the concurrent jurisdiction of this State if such former proseuction resulted in either a conviction or an acquittal, and the subsequent proseuction is for the same conduct, unless each prosecution requires proof of a fact not required in the other proseuction, or the crime was not consummated when the former trial began.

(d) A prosecution is not barred within the meaning of this section (1) if the former proseuction was before a court which lacked jurisdiction over the accused or the crime; or (2) if subseuqent proceedings resulted in the invalidation, setting aside, reversing, or vacating of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict. (Emphasis added.)

(e) Termination under any of the following circumstances is not improper:

(1) The accused consents to the termination or waives, by motion to dismiss or other affirmative action, his right to object to the termination.

(2) The trial court finds that the termination is necessary because (a) it is physically impossible to proceed with the trial; or (b) projudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to the defendant; or (c) the jury is unable to agree upon a verdict; or (d) false statements of a juror on voir dire prevent a fair trial.

(Acts 1968, pp. 1249, 1267).

STATEMENT OF FACTS

DANIEL L. WILLIAMS, Petitioner herein, was indicted by the Grand Jury of Fulton County, Georgia and charged with the offense of rape. Petitioner was arrested February 25, 1976, appearance bail was set at $2,500.00 on March 3, 1976 by Fulton Superior Court and same was made by Petitioner March 4, 1976. On October 20, 1976, Petitioner was tried by a jury for the offense of rape in the Superior Court of Fulton County, Georgia, was found guilty by this jury and sentenced by the court thereafter to twenty (20) years in prison. Motion for New Trial was filed in behalf of Petitioner on November 16, 1976. On November 23, 1976 the Fulton Superior Court granted the aforesaid motion on the grounds that the verdict was strongly and decidedly against the weight of the evidence, a guilty plea was received and Petitioner was sentenced to five (5) years in prison. On March 23, 1977, Habeas Corpus Petition pro se was filed in Butts Superior Court, hearing had thereunder April 22, 1977, Final Order and Judgment issuing May 3, 1977 granting the Writ of Habeas Corpus, the conviction under the plea of guilty, after the State conceded they had no new evidence, and the sentence of the Fulton Superior Court being set aside and vacated with the order that Petitioner be released from incarceration. The State of Georgia appealed the ruling of Butts Superior Court contending that this Habeas Corpus Court erred in its finding that the granting of the new trial by the trial court was a legal bar to further prosecution of Petitioner-Appellee on the charge of rape and thereby setting aside his conviction on the rape pursuant to a guilty plea, said appeal being docketed in the Supreme Court of Georgia on June 14, 1977. The Supreme Court of Georgia held . . . "We hold however that a grant of a new trial by the trial judge under Code Ann.

§ 70-202 ("contrary to the evidence and the principles of justice and equity") or Code Ann. § 70-206 ("decidedly and strongly against the weight of the evidence") does not result in a statutory double jeopardy bar under Code Ann. § 26-507(d)(2)". . .. The Supreme Court of Georgia decision was dated November 8, 1977 and also at that time Supersedeas and Bail was denied Petitioner, specially concurring decision being dated November 10, 1977, the case being styled James G. Ricketts, Warden v. Daniel L. Williams, Georgia Supreme Court Case No. 32563.

ARGUMENT AND CITATIONS OF AUTHORITY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

It is respectfully submitted and urged that the Supreme Court of Georgia erred in overruling Butts Superior Court, the Habeas Corpus Court, in its ruling that when a jury conviction and sentence of the court is negated with a Motion for New Trial Order based upon "a finding that the evidence did not authorize the verdict" a retrial including a plea of guilty would be barred under the provisions of Ga. Code Ann. §26-507(d)(2). It was the ruling of the Supreme Court of Georgia that the grant of a new trial by the trial judge under Ga. Code Ann. § 70-202 ("contrary to the evidence and the principles of justice and equity") or Ga. Code Ann. § 70-206 ("decidedly and strongly against the weight of the evidence") did not result in a statutory double jeopardy bar under Ga. Code Ann. § 26-507(d)(2). The Petitioner contends to the contrary and also alleged and contended both State and Federal constitutional violations in connection with the statutory procedure and a resulting judgment conviction and sentence . The Petitioner points out that Georgia precedence here involved can be found in Marchman vs. Georgia, 234 Ga. 40 and Parham vs. Georgia, 137 Ga. App. 498. Other cases that shed light on this troubled area of the law are U.S. vs. Ball, 163 U.S. 662 (1895), Bryan vs. U.S., 338 U.S. 552 (1950), Sapir vs. U.S., 348 U.S. 373 (1955), Forman vs. U.S., 361 U.S. 427 (1960), Green vs. U.S., 355 U.S. 184 (1957), U.S. vs. Wilson, 420 U.S. 332 (1975), U.S. vs. Jenkins , 420 U.S. 358 (1975), U.S. vs. Jorn, 400 U.S. 470 (1971), U.S. vs. Martin Linen Supply Company, 430 U.S. 564 (1977), Glasser vs. U.S., 315 U.S. 60 (1942) and now Greene vs. Massey, Supreme Court of United States Case No. 76-6617 and

Burks vs. U.S., Supreme Court of United States Case No. 76-6528 both argued before the Supreme Court of the United States on November 28, 1977. It would appear that the present Georgia law stands for the proposition that if the trial judge grants a motion for directed verdict of not guilty, a retrial is barred by Ga. Code Ann. § 26-507, but if the trial judge grants a new trial under Ga. Code Ann. § 70-202 (dicta in this case) or Ga. Code Ann. § 70-206 (holding in this case), retrial is not barred. The ruling of the Supreme Court of Georgia has rendered meaningless the phrase in Ga. Code Ann. § 26-507 (d)(2) which is as follows . . . "the evidence did not authorize the verdict". . . By way of dicta the Supreme Court of Georgia has held that if a trial judge grants a new trial on the ground that the verdict is contrary to the evidence, the bar of Ga. Code Ann. § 27-506 is not applicable , but if the Appellate Court finds that the verdict is contrary to the evidence, the bar of Ga. Code Ann. § 27-506 is applicable. It is the contention of the Petitioner that the test should depend on the provisions of Ga. Code Ann. § 26-507 which alludes to the absence of evidence rather than upon the court in which it is found that the evidence did not authorize a verdict, and that violation of rights of constitutional dignity are here involved.

CONCLUSION

Petitioner respectfully insists that his constitutional right to due process of law has been violated by not being afforded these protections under the provisions of Article I, Section I, Paragraph VIII and Article I, Section I, Paragraph III of the Constitution of the State of Georgia as well as the Fifth and Fourteenth Amendments to the Constitution of the United States of America in that following a jury trial with a guilty verdict and sentence a Motion for New Trial was granted on the finding that the evidence did not authorize the verdict and then following a plea of guilty he was sentenced to five (5) years imprisonment in the face of the aforesaid finding of the court in connection with the granting of the Motion for New Trial. It is strongly urged that the Supreme Court of the United States of America should issue Writ of Certiorari to review the judgment of the Supreme Court

of Georgia, that the Supreme Court of Georgia decision should be reversed and the Petitioner released from custody instanter.

Respectfully submitted,

HESTER & HESTER

By: Frank B. Hester
Attorney for Petitioner

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CERTIFICATE OF SERVICE

This is to certify that I am counsel for Daniel L. Williams in the attached petition for Writ of Certiorari, and that this date I have mailed in a properly addressed and stamped envelope, a copy of the Petition for Writ of Certiorari to Honorable Arthur K. Bolton, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 5th day of January, 1978.

FRANK B. HESTER
Attorney for DANIEL L. WILLIAMS

EXHIBIT "A"

SUPREME COURT OF GEORGIA

ATLANTA, November 8, 1977

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

James G. Ricketts, Warden v. Daniel L. Williams

Upon consideration of the Motion for Supersedeas and Bail filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, November 8, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

BEST COPY AVAILABLE

IN THE SUPREME COURT OF GEORGIA 144

DECIDED: NOV 08 1977

32563 RICKETTS, Warden v. WILLIAMS

HALL, Justice.

Williams was granted a new trial after a jury verdict on the basis of the finding by the original trial judge that "the verdict is decidedly and strongly against the weight of the evidence." Code Ann. § 70-206. He was later convicted, and brought this habeas corpus action, which resulted in an order for his release. The habeas court ruled that the new trial order was "a finding that the evidence did not authorize the verdict" and that a retrial was barred under Code Ann. § 26-507(d)(2). The state appeals, contending that the statutory double jeopardy bar does not apply to this case.

Marchman v. State,[1/] 234 Ga. 40 (215 SE2d 467)(1975) held that if an appellate court reverses a conviction on the basis that there was no evidence to support the verdict, a retrial is barred by Code Ann. § 26-507(d)(2). This would also be true where the trial judge grants a motion for a verdict of acquittal or not guilty under Code Ann. § 27-1802(a). Merino v. State, 230 Ga. 604 (198 SE2d 311)(1973). In both instances, there is a ruling as a matter of law that there is no evidence to support a verdict of guilty.

We hold however that a grant of a new trial by the trial judge under Code Ann. § 70-202 ("contrary to the evidence and the principles of justice and equity") or Code Ann. § 70-206 ("decidedly and strongly against the weight of the evidence") does not result in a statutory double jeopardy bar under Code Ann. § 26-507(d)(2). It has been repeatedly held that these general grounds for a new trial are directed solely to the sound discretion of the trial judge. "Grounds of a motion for new trial that the verdict is 'decidedly and strongly against the weight of evidence' (Code § 70-206), and 'contrary to evidence and the principles of justice and equity' (Code § 70-202), are addressed to the sound legal discretion of the trial judge and the law imposes upon him the duty of exercising this discretion. Lanier v. Tullis, 73 Ga. 142; Thompson v. Warren, 118 Ga. 644 (45 SE 912); McIntyre v. McIntyre, 120 Ga. 67 (47 SE 501, 102 ASR 71, 1 AC 606); Macon, Dublin & Savannah R. Co. v. Anchors, 140 Ga. 531 (79 SE 153); Mills v. State, 188 Ga. 616 (4 SE2d 453).

1. Three members of the court dissented (Ingram, Hall and Hill, JJ.) to the statutory construction of Code § 26-506 given by the majority. The General Assembly had the opportunity to overrule the majority opinion at its 1976 and 1977 sessions. While such a bill was introduced, it was not enacted into law. Under the normal rules of stare decisis regarding consistency and uniformity of decision, we will not re-examine the holding in Marchman.

The trial judge unqualifiedly overruled the general grounds of the motion for a new trial, and in doing so exercised the discretion vested in him by law. Where, as in the present case, the trial judge has exercised the discretion vested in him by law, and there is some evidence to support the verdict, the judgment overruling the general grounds of the motion for new trial is not error. Andrews v. Dilano, 206 Ga. 83 (55 SE2d 605); Shaw v. Miller, 213 Ga. 511, 513 (100 SE2d 179)." Kendrick v. Kendrick, 218 Ga. 460, 460-61 (218 SE2d 496)(1962).

"Whether their verdict is contrary to the evidence, or contrary to its weight, or decidedly and strongly against is [sic] weight, is a question the law vests in the trial judge's discretion. He may grant a new trial on these grounds, but this court has no such power. Where the trial judge approves the verdict, the sole question for determination by this court is whether there is any evidence sufficient to authorize it." Adler v. Adler, 207 Ga. 394, 405 (61 SE2d 824)(1950). See also Ridley v. State, 236 Ga. 147 (223 SE2d 131)(1976); Walters v. State, 6 Ga. App. 565 (67 SE2d 694)(1909). A ruling on these grounds does not amount to any ruling on the evidence as a matter of law and as a result the first grant is not normally reviewable by the appellate courts. Smith v. Telecable of Columbus, Inc., 238 Ga. 559 (234 SE2d 24)(1977). Furthermore, a motion for new trial, if

granted at the trial level has been held to be a forfeiture of any right to plead former jeopardy because of the grant of the new trial. Staggers v. State, 225 Ga. 581 (170 SE2d 430)(1969); Pride v. State, 125 Ga. 750 (54 SE 688)(1906); Taylor v. State, 110 Ga. 150 (35 SE 161)(1899). This is the general rule throughout the United States. Green v. United States, 355 US 184 (1957); Annot., 61 ALR2d 1143.

The trial court erred in granting the writ of habeas corpus.

Judgment reversed. All the Justices concur, except Jordan, J., who concurs in the judgment only, and Hill, and Bowles, J.J., who concur specially.

EXHIBIT "A" NOV 10 1977 CONT.

In the Supreme Court of Georgia

32563. RICKETTS, Warden v. WILLIAMS

HILL, Justice, concurring specially.

I concur in the judgment but not in all that is said in the opinion.

The trial judge granted a new trial after finding that "the verdict is decidedly and strongly against the weight of the evidence." As the majority opinion notes, the new trial was granted under Code § 70-206 which reads: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding."

Code § 70-206, supra, is involved in this case; Code § 70-202 was not relied upon by the trial judge and is not involved here. What the majority says about Code § 70-202 is dicta. It is not merely gratis dictum; it is erroneus gratis dictum, as will be seen below.

Code § 70-202 reads: "In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial before another jury."

The majority opinion says of Code §§ 70-202 and 70-206 that: "It has been repeatedly held that these general grounds for a new trial are directed solely to the sound discretion of the trial judge." Nesbit, J., writing for the court in Hall v. Page, 4 Ga. 428, 438-439 (1848), when only the forerunner of Code § 70-202 was in effect, said: "If the finding of the jury be clearly against evidence, or manifestly without evidence, the court, I hold, has no discretion, but is bound, in law, to grant a new trial. There is nothing in the laws, the Constitution, or in Magna Charta, or in the great principle of jury trials, which can justify, or for a moment tolerate a verdict without evidence, or contrary to all the evidence. The law will permit no such verdict; the juries have no power to render it, and no court should permit it to stand. You cannot predicate discretion of [sic] such a case." [Emphasis in original.]

The Judiciary Act of 1799 provided as follows (Cobb's Digest of 1851, p. 503): "In any case which has arisen since the signing of the present Constitution, or which may hereafter arise, of a verdict of a special jury being given contrary to evidence and the

principles of justice and equity, it shall and may be lawful for the judge presiding to grant a new trial before another special jury. . . ." This provision became Code § 70-202. Although the original Act of 1799 gave authority to the presiding judge to grant a new trial where the verdict was contrary to the evidence, the 1848 decision in Hall v. Page, supra, converted that authority into a duty.

In 1854 an act to regulate the granting of new trials was enacted, as follows (Acts 1853-54, pp. 46-47):

"1. Section I. Be it enacted by the General Assembly of the State of Georgia, That from and after the passage of this Act it shall be obligatory upon the Superior Courts of this State, to grant new trials in all cases, where an exception to any portion of the pleadings may be illegally sustained, or illegally overruled by the presiding Judge, against the applicant for a new trial; in all cases where any evidence may be illegally submitted to or illegally withheld from the Jury, against the demand of such applicant; in all cases where the presiding Judge may deliver an erroneous charge to the Jury, against such applicant, or refuse to give a legal charge in the language requested, when the charge so requested is submitted in writing; and in all cases where any evidence not merely cumulative in its character, but relating to

new and material facts, shall be discovered by the applicant, after the rendition of a verdict against him, and shall be brought to the notice of the Court within the time now allowed by law for entertaining a motion for a new trial.

"2. Sec. II. And be it further enacted, That it shall be obligatory upon the Supreme Court of this State, to reverse the judgment below and award a new trial in every case, where it shall appear that an error has been committed in any of the points enumerated in the first Section of this Act, by the Judge presiding at the trial of the cause.

"3. Sec. III. And be it further enacted, That the Judges of the Superior Courts may have the power to exercise a sound discretion in granting new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear some slight evidence in favour of the finding, and the Supreme Court shall have power to revise and control such discretionary power in the Superior Courts." The act contained no repealer clause.

As can be seen, section I of the 1854 act was obligatory on the superior courts, section II was obligatory on this court, but section III was discretionary as to the superior courts.

The Code of 1863, in § 3637, continued the power of the superior courts to grant new trials where the verdict was contrary to the evidence. The discretionary power to grant new trials was continued in § 3641.

The two Code provisions (now §§ 70-202 and 70-206) are different and distinct. In Josey v. State, 197 Ga. 82, 93 (28 SE2d 290) (1943), the court said: "One of the grounds of the motion for new trial is that the verdict is strongly and decidedly against the weight of the evidence. This, however, must be addressed to the trial judge. Code § 70-206. The law gives to him alone the authority to grant a new trial for such a reason. This court has no such power. 'The Supreme Court . . . shall be a court alone for the trial and correction of errors of law.' Constitution, Art. 6, Sec. 2, Par. 5 (Code § 2-3005). Under the general grounds usually contained in such a motion, it is a question of law whether the verdict is contrary to the evidence and without evidence to support it." [Emphasis supplied.] In Josey v. State, supra, this court ruled that whether the verdict is contrary to the evidence and without evidence to support it is a question of law. That is, the grant or denial of a new trial under Code § 70-202 (i.e., whether the verdict is contrary

to the evidence, etc.) raises a question of law upon which this court can and does pass. Hall v. Page, supra.

What the majority say about Code § 70-202 is dicta. Moreover, it is erroneous dicta. The grant or denial of a new trial under Code § 70-202 is not discretionary.

The majority now rail about Marchman v. State, 234 Ga. 40 (215 SE2d 467) (1975), so much that they misconstrue Code Ann. § 26-507. The majority find that if the trial judge grants a motion for directed verdict of not guilty, a retrial is barred by § 26-507, but if the trial judge grants a new trial under Code § 70-202 (dicta in this case) or Code § 70-206 (holding in this case), retrial is not barred. A directed verdict of not guilty is covered by the phrase "thereby adjudged not guilty" in § 26-507(d)(2). The majority render meaningless the phrase "the evidence did not authorize the verdict" in that same section.

The majority say, by way of dicta, that if a trial judge grants a new trial on the ground that the verdict is contrary to the evidence, the bar of Code § 27-506 is not applicable, but if the appellate court finds that the verdict is contrary to the evidence, the bar of Code § 27-506 is applicable. Thus, according to the majority, if the trial judge sustains a § 70-202

motion then the defendant can be retried, but if the appellate court finds that the trial judge should have sustained the motion but didn't, the defendant cannot be retried. The test should depend, as Code § 26-507 provides, upon the absence of evidence rather than upon the court in which it is found that the evidence did not authorize the verdict.

In my view, if a trial judge finds under Code § 70-202 that the verdict is contrary to the evidence, then "the evidence did not authorize the verdict" and retrial is barred by § 26-507. That is what the General Assembly provided. Bethay v. State, 235 Ga. 371, 375 (219 SE2d 743) (1975). The dicta in the majority opinion does not change the Code section.

I am authorized to state that Justice Bowles joins in this concurring opinion.